No. 13,004

IN THE

United States Court of Appeals

For the Ninth Circuit

RAOUL A. COSENZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Closing Brief

Appeal from the United States District Court,
District of Arizona

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STATEMENT OF FACTS

The government's brief creates the impression that the appellant was an accessory to Booth's offense of stealing jewelry and transporting it to Arizona. Not only are there no facts to support this but the contrary is the truth. Booth had made up his mind and laid his plans to go east and commit the burglaries before he ever talked with appellant

(T.R. 32). The robbery was committed in August, 1949 (T.R. 36); and the jewelry brought to Phoenix (T.R. 38). Prior to the time appellant saw it in December (T.R. 43), Booth had tried to dispose of it through others in Phoenix (T.R. 64). The relationship of appellant to Booth was not that of an accomplice as the government seems to contend. As a matter of fact, when Booth's testimony is read in its entirety (T.R. 30 *et seq.*), it is obvious that Booth had only "disgust" for appellant as a partner in crime and never believed that appellant could help him dispose of the jewelry.

ARGUMENT

I.

There Is No Evidence to Show That the Goods Were a Part of Interstate Commerce When Received

Appellee attempts to justify its position that a Federal crime was committed because

> "* * * the jewelry constituted interstate commerce up until on or about the first day of December, 1949, when it was delivered to Appellant at which time he took it to Skipper's Bar in Phoenix, Arizona; then and only then can it be maintained that the jewelry ceased to constitute interstate commerce [Appellee's Brief, p. 7]."

Following this line of reasoning, it would be more logical to say that the jewelry "ceased to constitute interstate commerce" when Booth presented the jewelry to others for sale prior to the time he showed it to appellant (T.R. 64). Booth brought it to Phoenix where he lived, and left it there while he went about his business (T.R. 60). The jewelry had come to rest.

McNally v. Hill, 3 Cir., 1934, 69 F.2d 38, cited by appellee is not in point. As is shown in the opinion of the Supreme Court, 293 U.S. 131, 79 L.ed. 238, 55 S.Ct. 24, the only question determined by the lower court was: did the indictment charge a Federal offense? The evidence was not considered by the court; and the court presumed that it was sufficient to support the verdict of guilt.

Appellee also cites *United States v. Gollin,* 3 Cir., 1948, 166 F.2d 123. There the court held that where goods begin their interstate journey, because the owner has the power to divert the shipment does not take the shipment out of such commerce. The Court of Appeals reversed a judgment of conviction because the lower court directed the jury to find that the goods involved were moving in interstate commerce. But that is a question for the jury to determine. In the case at bar, the court committed the same error for it took away the right of the jury to determine the question by failing to instruct that the appellant could be found guilty only if the jury found that the goods were moving in interstate commerce when the appellant received them.

Hughes Bros. Timber Co. v. State of Minnesota (1926), 272 U.S. 469, 71 L.ed. 359, 47 S.Ct. 170 (a tax case); *United States v. General Motors Corporation,* 7 Cir., 1941, 121 F.2d 376 (dealing with the Sherman Anti-Trust Act); and *Local 167 of I. B. of Teamsters v. United States* (1934), 291 U.S. 293, 78 L.ed. 804, 54 S.Ct. 396 (also dealing with monopolies) are so far afield that it merely confuses the issues to discuss them.

II.

The Court Should Have Instructed the Jury That in Order to Return a Verdict of Guilty the Jury Would Have to Find That the Goods Were a Part of Interstate Commerce When Received.

The appellee concedes that whether or not the jewelry was a part of interstate commerce when it was "received" by the appellant is a question of fact. Therefore, it should have been submitted to the jury as was done in *Baugh v. United States,* 9 Cir., 1928, 27 F.2d 257.

The appellee also concedes that the court's instructions (except for reading the indictment and the statutes[1]) were erroneous. This resolves the problem to the one question: was the error plain and prejudicial? It is again submitted that this error requires reversal.

The law as stated in the cases cited at page 18 of Appellee's Brief is good law. The cases state the general rule that an objection must be made to an erroneous instruction if the error is to be relied upon in seeking a reversal. It is the exception to the rule, as stated in *Screws v. United States,* 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.ed. 1495, 1505,[2] upon which the appellant relies. Incidentally, such is the rule in Arizona. See *State v. Betts,* 1951, 71 Ariz. 362, 227 P.2d 749, where the court said:

> "* * * it is the duty of the court in criminal cases to give instructions on the general, fundamental principles of the law pertaining to the offense charged."

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(1) The court gave the so-called statutory definition of "Interstate commerce" found in 18 U.S.C. § 10 (see note 8, page 11 of the opening brief). It could not have been helpful to the jury, for it does not explain the meaning of the term.

(2) The citation to the United States Reports given in the opening brief is erroneous.

III.

The Facts Are Not Sufficient to Establish the Offense of Misprision of Felony

The appellee recites that the appellant "actually encouraged and supported the theft of jewelry in Oklahoma (Brief, p. 19)." As pointed out before this is not a fact. Assuming it were the truth for the sake of the argument under this assignment of error, the following anomalous situation springs up: D causes X to commit a felony in violation of a Federal statute, thereby becoming a principal under 18 U.S.C. § 2. On gaining knowledge that the felony has actually been committed, D, according to appellee, violates 18 U.S.C. § 4 (the misprision statute) if he does not as soon as possible make the crime known to the government. In other words, it is argued, that § 4 compels a person to abandon the privilege against self-incrimination conferred upon him by the Fifth Amendment to the Constitution. Obviously, such is not the law.

For this reason and those set forth in the opening brief, it is submitted that the verdict of guilty on the second count of the indictment should be reversed.

CONCLUSION

In the interests of justice, it is respectfully submitted that this Court should reverse the judgment of the District Court.

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